

1 UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
3

4 THOMAS NGUYEN,)
)
5 Plaintiff,) No. 11-CV-2594-WQH
)
6 v.) October 16, 2015
)
7 SAN DIEGO POLICE DEPARTMENT, et) 11:00 a.m.
al,)
8 Defendants.) San Diego, California
)
9 _____)

10
11 TRANSCRIPT OF BENCH TRIAL - DAY THREE
12 BEFORE THE HONORABLE WILLIAM Q. HAYES
13 UNITED STATES DISTRICT JUDGE
(Oral Argument)

14 APPEARANCES:

15 For the Plaintiff: Robert H. Rexrode, III
16 Law Offices of Robert Rexrode
427 C Street, Suite 310
San Diego, CA 92101

17 For the Defendant: Timothy C. Stutler
18 Beverly Roxas
San Diego City Attorney
1200 Third Avenue, Suite 1100
19 San Diego, CA 92101

20
21
22 Court Reporter: Melinda S. Setterman, RPR, CRR
District Court Clerk's Office
23 333 West Broadway, Suite 420
San Diego, California, 92101
24 melinda_setterman@casd.uscourts.gov

25 Reported by Stenotype, Transcribed by Computer

1 SAN DIEGO, CALIFORNIA, OCTOBER 16, 2015, 11:00 A.M.

2 * * * *

3 THE CLERK: Number two, case 11-CV-2594, Nguyen vs San
4 Diego Police Department, on for oral argument hearing.

11:02 5 MR. REXRODE: Good morning, Your Honor. Robert
6 Rexrode for the plaintiff, Mr. Nguyen. He is here.

7 THE COURT: Good morning, sir.

8 MS. ROXAS: Good morning, Your Honor. Beverly Rojas
9 for defendants, and Timothy Stutler for defense as well.

11:02 10 MR. STUTLER: One of our officers is ill today,
11 Officer Lopez, so he won't be here today.

12 THE COURT: All right. Thank you. Thank you,
13 Counsel. I've had an opportunity to review your briefs.

14 Mr. Rexrode, any comments that you would like to make,
11:02 15 sir?

16 MR. REXRODE: Very briefly. Thank you, sir.

17 I think it is pretty well briefed out. I would like
18 to underscore, I think, maybe to a certain extent the parties
19 are talking past each other. What really comes through in
11:03 20 defendant's brief is, look, we don't care about the CIA -- I'm
21 sorry -- the defendant's in this case don't care about the CIA,
22 don't care about Mr. -- what Mr. Nguyen thinks about the CIA.
23 It has nothing to do with what happened, but it was the fact of
24 him -- of Mr. Nguyen protesting where he was that caused the
11:03 25 officers to act, and that is enough to make it not content

1 neutral. That is enough to make it motivated by Mr. Nguyen's
2 speech.

3 The defendants say over and over, it was Mr. Nguyen's
4 disruptive behavior that caused the officers to act. The only
11:03 5 testimony the only evidence as to what Mr. Nguyen's actions
6 were holding a sign, yelling, and pacing to and fro on a
7 sidewalk.

8 There was affirmative evidence that he didn't touch
9 anybody, that he wasn't bumping into people, but the officers
11:04 10 seem to be motivated by the fact that people in the crowd were
11 reacting negatively to Mr. Nguyen's speech, and that means that
12 the officers were motivated by the speech.

13 I think I said in my final paper, it doesn't
14 necessarily make them bad guys, but that is why they acted, and
11:04 15 I just don't see how the Court can make a factual finding that
16 Mr. Nguyen's speech was not a significant motivating factor.
17 It doesn't have to be the only factor, just a significant one,
18 and it certainly was. If he wasn't talking where he was, the
19 officers wouldn't have acted.

11:04 20 THE COURT: Well, there is a -- and I know some of
21 this testimony is disputed from reading the briefs, but to the
22 extent that the Cox employees said, look, we had this -- they
23 called it a secured area -- to the extent that we had this area
24 that we had cordoned off around the TV platform for, you know,
11:05 25 for a variety of reasons, whether it was for the convenience of

1 employees or whether it was for, you know, we want to have some
2 space so we don't get crowd noises right behind the platform or
3 we don't have people trying to get in the -- in the camera
4 shot -- whatever it is -- we had this area that was cordoned
11:05 5 off, and you know, Mr. Nguyen was in the area, and that we --
6 one of the gentleman asked him, at least according to the
7 testimony, one of the witnesses, you know, we asked him to
8 leave, and he indicated that he wasn't leaving, and, you know,
9 might have been some displeasure shown by him by the fact that
11:05 10 he was asked, and then, well, I got a security person, and I
11 asked the security person to have him leave, and he wouldn't,
12 and then the police came and they encountered him, and they
13 encountered him in the context that, hey, we were called to
14 come there by people -- by the security who were contacted by a
11:06 15 citizen who said, hey, he's in a place he shouldn't be, and so
16 when we contacted him, he was agitated, we couldn't understand,
17 you know, what he was saying, and he was indicating he wouldn't
18 leave the area where he was.

19 Now, I understand, you know, there is a difference of
11:06 20 opinion on whether those -- what the facts are and where he was
21 and whether that occurred or didn't occur, but hypothetically
22 speaking if it did, if it did, does that change your analysis
23 that it is not the case that, you know, there was some kids
24 that were offended or parents that were offended by the fact
11:06 25 that there was, perhaps, that there was inappropriate language

1 being used so it wasn't that people were concerned about the
2 affect his speech would have on others in the vicinity or they
3 didn't want children to hear bad words so that is why they
4 called and that's why they wanted him to, you know, have to
11:07 5 move elsewhere, but it was, you know, the Cox employee who
6 contacted the security, who contacted the police, to say there
7 is a gentleman here in this area and we're requesting that he
8 leave the area, does that change the analysis at all?

9 MR. REXRODE: No.

11:07 10 THE COURT: Tell me why.

11 MR. REXRODE: And here's why, I think my strongest
12 argument and I think it is true, too, granting the Court's
13 hypothetical, granting that we're going to credit that Cox
14 employees' testimony -- the other Cox employee described for
11:07 15 the Court what the security zone was, right where it was and
16 that it did not encompass the sidewalk.

17 The first statement, and we have a record of it -- I
18 forget if it is Exhibit I or L or J -- but it is the transcript
19 of one of the officers describing Mr. Nguyen, and he is
11:08 20 standing on the sidewalk, so we know that when the officers
21 first saw Mr. Nguyen, he was not in that secured zone because
22 he was on the sidewalk, and the Cox employee testified that the
23 sidewalk was not within the secured zone.

24 Second, there is no evidence that the call that came
11:08 25 to these officers indicated that Mr. Nguyen was refusing to

1 leave the secure area. There is just not -- if you go back to
2 the dispatch tapes, the first call out is, hey, we've got some
3 guy causing a 415. They don't say anything about, hey, there
4 is some guy in the Cox security area. They don't say anything
11:08 5 about that.

6 THE COURT: Although, would they be required to do
7 that? Why would they --

8 MR. REXRODE: I am not saying that they are required
9 to do it, but if the Court's hypothetical is based upon the
11:09 10 police responding to a complaint that someone is refusing to
11 leave the secured area, there is no evidence that that was the
12 complaint. And we actually have real evidence -- I mean, this
13 was a long time ago, so the best evidence is the communications
14 that were happening at the time. Memories fade. There is
11:09 15 nothing wrong with that, memories fade.

16 But are they required to say, hey, there is someone in
17 a secured area, of course not, but the fact that they didn't
18 really undermines the Court's hypothetical. He wasn't in the
19 secure area. There is no reason to believe that the two
11:09 20 defendant officers were responding because he was in a secured
21 area, he was on the sidewalk pacing up and down.

22 And we also have affirmative evidence as to what the
23 security guard told the police. Because if the Court will
24 recall on the dispatch tape, Elite said he was trying to get
11:09 25 into the street earlier -- but this is an officer talking, one

1 of the two defendant officers -- Elite said he was trying to
2 get into the street earlier, but now he is just on the sidewalk
3 yelling, trying to get attention.

4 So I think that the defendants' defense has shifted a
11:10 5 little bit since my first brief. I mean, we all sat through
6 the day of testimony. The whole thing was -- remember the
7 image of the police officer responding to the scene and
8 spectators walking by going, there is some crazy guy cursing
9 down there, my kids are here. It was all about that. It was
11:10 10 all about the profanity.

11 And, again, it doesn't necessarily make them bad guys, but
12 it is a violation of the First Amendment. It just is. The
13 case law is super clear on that. So, no, to answer directly,
14 the answer is no because, one, he is not in the secured area
11:11 15 when these defendants show up, and two, there is really nothing
16 to indicate that anything about that secure area had anything
17 to do with these officers actions, because there is no evidence
18 that what happened in that secure area that didn't was known by
19 these officers.

11:11 20 Does that answer -- it may not be the best answer, but is
21 there anything --

22 THE COURT: Well, as I understand your response, it is
23 two-fold. A lot of it goes to the believability of the witness
24 testimony, that when you talk about the real evidence that it
11:11 25 is the tape. Testimony is real evidence as well. But it seems

1 that part of the argument is if it really happened the way that
2 some of those witnesses testified to, wouldn't it have been
3 reflected more in the dispatch tape, and one of the officers
4 wouldn't have said he was on the sidewalk because, you know,
11:11 5 the sidewalk wasn't in that orange fenced area, so you really
6 shouldn't conclude that it happened the way some people said it
7 happened because there is some other evidence that suggests
8 that it didn't happen that way?

9 MR. REXRODE: Yes. And then my second point is, it
11:12 10 doesn't matter if it did happen that way in terms of the
11 secured area because there is nothing really indicating that
12 these officers were acting on that or they even knew about it.

13 THE COURT: Well, I guess it depends on what then --
14 that was really my question. Doesn't it depend somewhat --
11:12 15 that point, doesn't it depend on what testimony is credited?
16 Because it -- is it a different case if, you know, the one
17 theory or the one version is that, hey, he is somebody who is
18 protesting, he is waving his sign, he is making a lot of noise,
19 people in the immediate vicinity are annoyed by it or
11:12 20 uncomfortable by it, and they don't like the profanity and they
21 don't want their kids to hear it, and so if the context is,
22 hey, you know, mister police officer, you know, we would all be
23 happier if he was removed, and that, in essence -- so there was
24 contact, and that is why the plaintiff was removed. That is
11:13 25 sort of one scenario.

1 The other one is -- or one other one is that, you
2 know, somebody from Cox said you can't be here. Then he
3 indicated he wasn't going to leave, and then they got security,
4 which would seem to be the logical thing. You are not going to
11:13 5 try to force somebody out of an area yourself for a variety of
6 reasons, so you get the security and the security sees him and
7 says, well, I am not going to do it either. I am not doing it
8 for a variety of reasons. I am going to contact the police.
9 And the police come, and they say, okay, this area you can't be
11:13 10 in here and so we have to move you to another area.

11 Those seem to be like two different -- two different
12 versions that would seem to me to have, you know, a legally
13 significant difference. Does it matter?

14 On the one context the police are called by a security
11:14 15 guard that says, hey, we need your assistance, come get
16 somebody out of this area, and in the other one, you know, the
17 police are encountering somebody on a public sidewalk who is
18 apparently making some other people uncomfortable.

19 It just seems like those are very -- those are
11:14 20 different to me, and it seems like there would be a legal
21 significance. That is what I am asking, is there any legal
22 significance to those, one, where the police are called -- if
23 the police are called to an area by, in essence, you know,
24 indirectly by a citizen saying, hey, there is somebody in this
11:14 25 area that they can't be in this area versus someone who is in

1 an area that any member of the public can be?

2 MR. REXRODE: Whether that would be legally
3 significant, I am hesitant to answer that because I haven't
4 thought it all the way through, and I certainly don't want to
11:15 5 do any disservice to my client.

6 At the risk of punting, I think it is -- I think it is
7 a valid punt, and here's why, I am not suing Cox, right? I am
8 not suing Cox. I am not suing Elite Security. I am suing that
9 man and his ill co-worker. Even if they do get a call that
11:15 10 says, hey, there is a guy in a secure area that can't be there,
11 right, even if that happened, there is no evidence that is what
12 the call was about or that those officers --

13 THE COURT: I think the record may be different as far
14 as --

11:16 15 MR. REXRODE: Okay. I am recollecting. I didn't take
16 notes on everything that was said by the officers.

17 THE COURT: Sure.

18 MR. REXRODE: But I do, again, think the best evidence
19 is actually the dispatch, the contemporaneous, but even if that
11:16 20 is the case, we know that when they arrived there, right --
21 even if an officer gets that call, okay, I am -- the reason
22 that I am being motivated to go to this location is there is
23 someone who is where they are not supposed to be.

24 THE COURT: Right.

11:16 25 MR. REXRODE: But if you show up at that location and

1 the person is exactly where they are allowed to be on a public
2 sidewalk, that should be the end of the encounter, right?

3 THE COURT: Well, I guess if it is the case that --
4 under my hypothetical, what if when the officer arrives the
11:16 5 individual is in the area that -- and when you say "secured
6 area," and I understand that is, you know, the secured area was
7 not set up by, like, a government entity to say this is a
8 security area, but this is an area that certainly Cox thought
9 they had the permission, apparently they did, to block off an
11:17 10 area for whatever reasons.

11 And so if somebody -- if the officer shows up and the
12 person is in that fenced-in area, and they say, look, you just
13 can't be here, so you got to move outside that fenced-in area,
14 and if the response was, interesting, but I am not going
11:17 15 anywhere, I'll be staying right here, so go on about your
16 business, leave me alone, and I am staying right here, can --
17 under that hypothetical can the officer say, well, no, actually
18 you can't do that, you are going to have to move outside, or
19 does the officer have to take the position, all right, you
11:17 20 know, I asked and he is not going to move, so end of story?

21 MR. REXRODE: It depends on the area, and even if --
22 even granting -- let's just grant that every area of the
23 hypothetical is true, if a motivating factor was moving
24 Mr. Nguyen out of -- away from the orange little flimsy fence,
11:18 25 right, it doesn't necessarily mean that his First Amendment

1 rights weren't violated because if there was an additional
2 significant motivating factor which was based on his speech,
3 then that would suffice under the law.

4 Second, I am trying to think back to the officers'
11:18 5 testimony because that can be the only place where I can think
6 of maybe there was testimony that maybe he was inside. Can I
7 address two things on that --

8 THE COURT: Sure.

9 MR. REXRODE: -- because I didn't do it in my
11:18 10 briefing?

11 It is not true, and here's why it is not true: We
12 have a contemporaneous recording placing Mr. Nguyen on a public
13 sidewalk, and we know the sidewalk is not in the secure zone.
14 We also have testimony -- here is another reason why it is not
11:18 15 true: We also have testimony that this secured area was of --
16 it was a fence -- it may have been a flimsy orange material,
17 but it was actually enclosed, and the testimony from the
18 officers was they approached Mr. Nguyen and then they
19 physically move him back towards the grass area.

11:19 20 I am trying to think back. There was no testimony
21 about -- about moving him towards an opening in this fence.
22 There is no testimony about pushing down the fence with a boot
23 to get Mr. Nguyen out. It is just inconceivable under this
24 evidence that Mr. Nguyen was inside that secured area when the
11:19 25 officers first approached him.

1 Did that answer your question?

2 THE COURT: I believe so.

3 MR. REXRODE: Okay. If the Court doesn't have any
4 other questions, I did sort of leave it out there in the
11:19 5 briefs.

6 THE COURT: And just one other point here. You
7 mentioned in your brief on page 20 that you said a request for
8 damages that --

9 MR. REXRODE: Yes, sir.

11:20 10 THE COURT: -- that the damages are somewhere between
11 11 and \$13 million.

12 MR. REXRODE: Yes, sir.

13 THE COURT: What evidence was introduced in the trial
14 that supports an amount of damages?

11:20 15 MR. REXRODE: The evidence at trial that supports an
16 amount of damages is two-fold. What happened to Mr. Nguyen
17 after the First Amendment violation including his eventual
18 captivity in a mental hospital for two days.

19 Second, what I consider is most important that I think
11:20 20 the Court should really hear is, look, you can credit
21 Mr. Nguyen's testimony or not credit it, but as that old
22 instruction says you can believe some, not, all, or none of it.
23 There were certain things that Mr. Nguyen testified about that
24 rang true.

11:21 25 And the one thing that he testified that I would ask

1 the Court to think about is since this day he no longer
2 protests outside of his van. The van itself is a form of
3 protest, but he no longer goes out into public spaces with
4 signs.

11:21 5 And for a man whose whole purpose in life at this
6 point is to convey what he honestly believes happened to him by
7 the CIA, that is not just chilling speech, that is a horrible
8 consequence of what the officers did, without assigning any
9 sort of malice towards the officers, and by saying that, I
11:21 10 definitely don't think that punitive damages are appropriate
11 under this evidence.

12 But that is -- you can compensate for the fear that
13 Mr. Nguyen has because if there is a sufficient monetary award
14 in this case, Mr. Nguyen will take comfort in that and say, you
11:22 15 know what, they won't do it to me again. They won't haul me
16 out of a public forum just for holding my sign and yelling.
17 That's the damage.

18 I wasn't trying to be facetious. I am trying to walk
19 a line here between my client and what I think the evidence
11:22 20 shows. Mr. Nguyen has consistently valued his losses at the
21 figure that I cited.

22 THE COURT: Fair enough.

23 MR. REXRODE: Thank you. But I do think a monetary
24 award is important precisely for what I said. I think that is
11:22 25 a real damage particularly to this gentleman, and if I remember

1 something from law school, they take Mr. Nguyen as they find
2 him.

3 THE COURT: All right. I'll give you a opportunity to
4 respond to counsel's argument.

11:22 5 Would you like to remain seated?

6 MS. ROXAS: No. It's okay.

7 THE COURT: You can. You sure?

8 MS. ROXAS: Thank you. Good morning, Your Honor.

9 THE COURT: Good morning.

11:22 10 MS. ROXAS: Just to address Mr. Rexrode's initial
11 statement that he believes that the defendant's brief is kind
12 of speaking around what the plaintiff's argument is. Just to
13 be clear, as far as the case law is concerned, what the --
14 amongst other things, what the plaintiff must show in this case
11:23 15 to prove his prima facie case is that the deterrence of his
16 speech has to be a substantial or motivating factor in the
17 officers' conduct.

18 THE COURT: Does it have -- it has to be "a"?

19 MS. ROXAS: It has to be "a," but the deterrence of
11:23 20 the speech has to be a substantial or motivating factor, and
21 that motivating factor must be significant.

22 Now, in other words, what it means is that the intent
23 of the officer in their action, their intent has to be
24 essentially to silence him. They took him out of this crowd.
11:23 25 He has a -- they have to show that they took him out of this

1 crowd to silence him. That simply wasn't the case.

2 What they took him for which was the second prong --
3 not the second prong -- plaintiff's second claim. They took
4 him under a 5150 hold. That is why they took him out of there,
11:24 5 not to silence him, whatever it is he is talking about.

6 Whether or not the officers care about the CIA, I agree with
7 Mr. Rexrode, it is irrelevant.

8 What is relevant here is that the reason why they took
9 him out was because he was mentally ill or they had a very
11:24 10 strong suspicion that he was mentally ill and a danger to
11 himself or others. They did not take him out to keep him
12 quiet. That wasn't what happened here, Your Honor.

13 What happened is these two causes of actions are
14 overlapping, and the reason why they took him out was as the
11:24 15 officers -- the credible testimony in this case is that the
16 officers reasonably believed or had a strong suspicion that he
17 was, in fact, mentally ill and resulting that was a result of a
18 danger to himself or to others.

19 So the last prong of whether or not there was a First
11:25 20 Amendment violation, which was the deterrence of plaintiff's
21 speech, has to be that motivating factor. It has to be a
22 motivating factor. He has not shown that.

23 He has just shown that essentially they recognized he
24 used the foul language, it is inappropriate, and out of
11:25 25 context. I don't think that anyone in this Court disputed

1 that. They recognize that.

2 At the end of the day it doesn't matter. Their
3 intention was not to silence him or to stop him from using that
4 inappropriate language but to get him out and evaluate him to
11:25 5 see whether or not he met the 5150 threshold.

6 THE COURT: Although, a lot of people use poor
7 language in a public space, right, and they are not -- the
8 police don't come up and talk to them and ask them if they are
9 okay, right?

11:25 10 MS. ROXAS: Agreed. But that -- that wasn't all that
11 was going on here, Your Honor. Respectfully, he was exhibiting
12 more behaviors that Officer Lopez and Officer Valdez believed
13 they needed to evaluate him. They needed to see whether or not
14 he was, in fact, meeting that threshold to be detained under
11:26 15 the 5150 hold.

16 THE COURT: And so what were the other factors? I
17 mean, clearly there was language that he was using that
18 offended people near him.

19 MS. ROXAS: It was offensive to people, and that is --
11:26 20 and the defendants concede that is not an issue here, in the
21 sense that you can offend people all you want. What the
22 problem is you are taking this and you are putting it in the
23 context of a family-oriented parade with children with
24 balloons, that have Thomas the Train, and --

11:26 25 THE COURT: But does that matter that it is a

1 family -- how is it relevant to what the officers did that it
2 was a family-oriented place versus say, you know, a Chargers
3 game --

4 MS. ROXAS: Okay.

11:26 5 THE COURT: -- at 8:00 at night? Is there a
6 difference that the officers can consider?

7 MS. ROXAS: Yes, Your Honor. The difference is
8 context. The difference is that when you take two officers who
9 have the common sense, life experience, and training, you put
11:26 10 them on the street and you see someone who is exhibiting these
11 behaviors with -- in front of children who have no idea what
12 you are talking about, who cannot appreciate any comment or any
13 opinion you have about the CIA or who are there a couple of
14 days before New Year's Eve -- one day before New Year's Eve to
11:27 15 cheer on balloons and marching bands, it is completely out of
16 context.

17 It is -- it is out of the norm, and the circumstances
18 are not appropriate, and that -- not that it is the cursing and
19 it is the loudness and it is the screaming, it is just that
11:27 20 that is a trigger that something is wrong here. This man is
21 not -- there is something off here, and we've all come into
22 those circumstances where, okay, this, you know -- given
23 another situation that is, you know, that is fine, it is not
24 that big of a deal, but look at the context that we're in.

11:27 25 This is not a context where everyone in the crowd is

1 loud and abrupt and cursing or even just yelling loudly at the
2 top of their lungs. They are not even doing that. It is a
3 very aggressive nature, and this is not an aggressive setting.

4 A Chargers game can be an aggressive setting and
11:28 5 understandably so. This is not that type of situation, and I
6 think that plays a part in what made the officers reasonably
7 suspect that something is wrong here, and I think that based on
8 their actions, they acted reasonable under these circumstances.

9 They see something is wrong here. They don't just
11:28 10 haul him off and put him under a 72-hour hold. They want to
11 take him out so they can evaluate. They took him out of the
12 crowd. They spoke with him. Okay. Something is off. Doesn't
13 seem right. Let me speak to my supervisor.

14 THE COURT: In your view where did that happen? Where
11:28 15 did the conversation occur? Was he in this secure area, for
16 lack of a better term, you know, the orange, fenced-off area?
17 Was he on the sidewalk? Where was he, in your understanding of
18 the facts, as to when the first contact occurred between the
19 officers and the plaintiff?

11:29 20 MS. ROXAS: I believe the first contact occurred on
21 the sidewalk.

22 THE COURT: All right.

23 MS. ROXAS: As far as whether or not the officers knew
24 about whether it was in a secure zone, I think at that point, I
11:29 25 think Officer Lopez testified that he actually saw plaintiff

1 walk into -- not the security zone for -- the Cox Cable crew,
2 but actually the parade route, so he is already outside -- if
3 he is not in one secure zone, he is in another.

4 So Officer Lopez testified, and credibly so, that when
11:29 5 he saw Mr. Nguyen, he is going in and out of another restricted
6 area, so he is in the parade route where he is not supposed to
7 be, and he is going about, mowing -- with eyes wide open,
8 looking like he is mowing -- about to mow the crowd down,
9 things like that.

11:29 10 Those are the things that trigger the officers and
11 their belief that there is something wrong here to the point
12 where this man is so disconnected that he could possibly be a
13 danger to himself. That is the reason why they took him out.

14 They took him out to evaluate him, not to deter his
11:30 15 speech, not to silence him, not to stop him from cursing. They
16 took him out to evaluate him under the 5150.

17 THE COURT: All right.

18 MS. ROXAS: Another point that I want to touch on is
19 the issue of qualified immunity. I know that during summary
11:30 20 judgment it was brought up and the immunity, that portion of
21 the motion was denied, holding that there was a question of
22 fact with respect to what the officers testified to.

23 I believe that at the end of this trial, the evidence
24 was clear that they are entitled to qualified immunity in this
11:30 25 case that a reasonable officer would believe under these

1 circumstances, under the facts of the case that they were --
2 that they did have probable cause to deter -- to detain
3 Mr. Nguyen and that -- because of that they are entitled to
4 qualified immunity.

11:31 5 THE COURT: That would be based on what facts?

6 MS. ROXAS: Well, the officers received a call that
7 plaintiff was disrupting the parade. They got information that
8 plaintiff was on the parade route screaming incoherently,
9 cursing, screaming, scaring other spectators. When they saw
11:31 10 him, they realized it is much more than a man screaming,
11 cursing. His eyes are wide open. He is spitting. He is
12 sweating. He is out of context. He is staring at us like
13 we're not even there. He is holing his stick really tight.

14 Those -- those factors, Your Honor, they could see
11:31 15 that something was clearly wrong and his actions were bizarre
16 and out of context. That would give a reasonable officer
17 reason to believe they had probable cause. Even if this Court
18 finds that they didn't have probable cause, it can't be said
19 that a reasonable officer wouldn't believe that under those --
11:31 20 under the circumstances, and for those reasons, Your Honor,
21 they are entitled to qualified immunity.

22 THE COURT: All right. Thank you.

23 MS. ROXAS: Thank you, Your Honor.

24 MR. REXRODE: Very briefly, sir.

11:32 25 At the end of the day you have to determine what

1 happened. It is pretty obvious what happened. There was some
2 guy at a parade who was bothering people. He was bothering
3 people because he was carrying a weird sign, walking around,
4 maybe yelling obscenities, maybe not, and yelling about the
11:32 5 CIA, and he was bothering people.

6 THE COURT: Although in the context -- it has been
7 argued before, that -- and I just used the example of a
8 Chargers game. You can go there, and unfortunately people in
9 front of you, beside you, and they stand and scream profanities
11:32 10 for two and a half hours, and so to go some place and to see
11 people that may appear to be intoxicated or may be screaming
12 profanity, it is really not out of the -- unfortunately, it is
13 just not unusual behavior.

14 And so to have people -- I guess people feel they can
11:33 15 react that way in that type of a setting and it is not at all
16 out of the ordinary, so if you had an officer, you know, walk
17 by, it wouldn't be out of the ordinary behavior, and they would
18 probably just keep going and say, okay, well, okay, that is
19 what people are doing here.

11:33 20 Counsel makes the point that, hey, this is a setting
21 that is more aligned, you know, for small kids, not -- it is
22 more of a family event, and so to the extent that somebody may
23 appear to be angry and may be using that type of a language, it
24 is -- it is a little bit -- it might cause a little bit more
11:33 25 sort of investigation or look to say, well, that is usually not

1 what we see here.

2 Usually people don't do that here. Maybe there is
3 something else to look at, and to see, all right, there is
4 somebody, you know, with a very large sign that is involved in
11:34 5 a protest. We don't normally have, like, a protest at this
6 event, just based on upon the nature of the event, whereas if
7 there was the Democratic convention or Republican convention at
8 the Convention Center you would see people with signs marching
9 up and down yelling freedom of speech, that would be sort of
11:34 10 not out the ordinary.

11 Do those factors matter? Is that something that the
12 officers can say, it is a little unusual to hear that type of
13 language at an event like this? Protests, we normally don't
14 get those. It is a little unusual here that the CIA protest
11:34 15 would be here just based on the audience, and so it doesn't
16 seem like that would be that effective here based on the people
17 that are here, so let me just make some inquiry.

18 And so -- and there is an inquiry, and if for whatever
19 reasons -- suppose the inquiry is, you know, maybe part of it
11:34 20 is language, you know, part of it is just a difficulty
21 communicating, and so that is a little bit of a factor, and
22 perhaps there is some annoyance with being, you know,
23 questioned or, you know, someone saying why are you talking to
24 me, and perhaps there is some annoyance from the plaintiff,
11:35 25 maybe difficulty language skills, and so from that point the

1 officers, they just can't understand. They can't -- they can't
2 really communicate.

3 And so if they can't communicate and they won't get a
4 responsive question -- or responsive answer to their question,
11:35 5 are they then permitted to say, well, let's -- let me have
6 further inquiry?

7 Or is it the case they can't even do that if it is the
8 case -- or is it a case of, look, you can swear at a parade?
9 You know, you can't stop somebody from swearing, and obviously
11:35 10 you can protest at a parade. You can't stop somebody from
11 doing that, so that is it, you couldn't do anything?

12 I mean, somebody calls you. You see it. Well, the
13 guy has a sign. He can have a sign here. You can scream all
14 you want. You can say whatever you want. I am not going to
11:36 15 talk to him. I am just going to walk away. End of story?

16 MR. REXRODE: That would have been the appropriate and
17 lawful thing to do.

18 THE COURT: Well, if you had the case, though -- is it
19 case that if the officer is in the position that someone says,
11:36 20 look, there is somebody down there that, you know, they got
21 this huge sign -- they have a sign, a sign, it is on a stick.
22 They seem very, very agitated, screaming, yelling, cursing, you
23 know, saying -- just seems totally out of context here. The
24 behavior just seems very unusual. I want you to investigate.

11:36 25 And the officers goes down and says, look, I am not

1 doing anything. I am not going to talk to him. I am not going
2 to do anything. Forget it.

3 And then suppose the case is that the person is that
4 the person does have a mental health issue and hurts somebody
11:37 5 or hurts himself right there, is that just a risk the officer
6 has to take, look, if you contact him and you talk to him, you
7 can't do that, because you are going to violate the First
8 Amendment rights.

9 And if somebody directs you there and they say, I
11:37 10 think this person may have a mental health issue, I think you
11 should investigate, the officer says, I am not doing it, and if
12 they do something to somebody, then maybe they can sue me for
13 not doing something, but, you know, I am going to get sued one
14 way or the other.

11:37 15 If I talk to him, I am getting sued because I am not
16 really supposed to do that, and if I don't make any inquiry,
17 even though I've been directed to them and my observations are
18 it is very -- it is conduct that is out of the ordinary just
19 based on the language, the nature of the activity, and I can't
11:37 20 understand what the gentleman is saying, I can't understand it,
21 it makes no sense to me what I listened to, but I am not going
22 to -- I am not going to ask him anything, and if he does
23 something to himself or to someone else, I'll get sued for
24 that.

11:38 25 Is that -- let me ask you, is that really what the --

1 is that the officer's -- kind of like, that is -- is that the
2 cost of doing business? Is that --

3 MR. REXRODE: Look, can a cop go up and talk to anyone
4 and talk to them? Sure, but let's --

11:38 5 THE COURT: I am talking about context.

6 MR. REXRODE: I understand.

7 THE COURT: I understand your argument -- or your
8 position is you can't -- I mean, under the facts, when did the
9 violation first occur? Is it when the officer -- assuming that
11:38 10 a public street -- I understand whether it is debated about
11 whether he is going on the parade route, in or out of the
12 parade route. Let's put that aside.

13 Let's say, for argument sake, on the sidewalk, or
14 really close to the sidewalk, you know, large sign on a stick,
11:39 15 primarily a family event, a lot of loud noise, some cursing but
16 a lot of loud noise, people unable to make out exactly what it
17 is but something to do with the CIA, and some difficulty
18 understanding clearly what is being said, so you have those
19 facts, and suppose somebody directs the officers and says, hey,
11:39 20 I want you to investigate this event, so the officer goes up
21 and sees those things.

22 In your view, what can the officer do before there is
23 a violation? Can the officer go up and say, sir, I would like
24 to talk to you? Can -- can they do that?

11:39 25 MR. REXRODE: Yes, they can do that to anyone. I can

1 go up to this officer and ask him to talk to me.

2 THE COURT: So the officer goes up and talks to the
3 individual, and the person is -- appears to the officer to be
4 very, very upset with the fact that they are being spoken to,
11:40 5 and maybe just feel passionately about what they are saying --
6 it would be impossible to tell whether or not they are upset
7 that you interrupted them from expressing themselves or they
8 are just upset that you are interrupting them.

9 And your interaction with them is that you are not
11:40 10 getting a responsive answer. You may ask, like, a basic
11 question, but what you get back is not responsive at all to the
12 question, and the -- you question whether this person has the
13 ability to communicate with you. Can you do anything then, or
14 are you required to just walk away?

11:40 15 MR. REXRODE: There is two problems with that, the
16 first is that is not what occurred here.

17 THE COURT: I understand -- and there is a dispute on
18 the facts.

19 MR. REXRODE: Actually, I don't think that there is a
11:41 20 dispute as --

21 THE COURT: Well, all I am asking you is for the
22 hypothetical.

23 MR. REXRODE: In that hypothetical, of course, there
24 is something else that they can do.

11:41 25 THE COURT: Can you do it without committing a

1 constitutional violation?

2 MR. REXRODE: Sure.

3 THE COURT: What is that?

4 MR. REXRODE: How is it going? How are you?

11:41 5 THE COURT: If the responses are nonresponsive, then
6 what?

7 MR. REXRODE: Stand there.

8 THE COURT: And then what?

9 MR. REXRODE: Look at him, and if he is not a danger
11:41 10 to himself or others, walk away.

11 THE COURT: But how would you -- when you are trying
12 to decide whether someone is a danger to themselves or others,
13 and hypothetically if you are trying to communicate with
14 somebody and you are just unable to, can you -- can you have
11:41 15 any additional conversation? Can you continue to try to
16 communicate?

17 Or do you have to say, look, I don't understand what
18 the person is saying. I don't think that they understand me.
19 I don't know if there is a language difference or not, but
11:42 20 we're not able to communicate. So are they a danger to
21 themselves or others? I have no idea because I was trying to
22 find that out, and I can't.

23 And so does the officer have to walk away not knowing
24 it, or are they allowed to make some additional inquire to find
11:42 25 out?

1 MR. REXRODE: Something else just slipped into the
2 hypothetical, which is that --

3 THE COURT: I didn't slip anything. I am asking the
4 questions.

11:42 5 MR. REXRODE: No, no, no. I'm sorry. That I
6 wasn't -- that my earlier answer wasn't factored in. I am not
7 saying you are trying to cross me or anything like that.

8 Look, if the reason that you are going up is to see if
9 someone is a danger to themselves or to others, there has to be
11:42 10 a reason to think that. And if all the person is doing is
11 oddly protesting, my position would be that is insufficient to
12 even raise that cause.

13 And, yeah, if you are talking to someone and you are
14 having trouble communicating with them and in the back of your
11:43 15 mind you are wondering like, hey, I wonder if they are a danger
16 to themselves or others, and talking to them, just talking, not
17 telling them what to do, not ordering them to do anything, just
18 talking, how is your day, that stuff, if that doesn't get you
19 to the point that shows you one way or the other, yes, you walk
11:43 20 away because it goes down -- it comes back to this repugnant
21 idea that is in the defendant's brief that we question the
22 apparently mentally ill and whether they are going to hurt
23 someone.

24 We can do that with anyone. I can -- I can make -- I
11:43 25 represent Hells Angels sometimes. You see a Hells Angels

1 walking down the street, right, instinctively, hey, I wonder if
2 he is a danger to someone else, but we don't have a right to go
3 up and say, hey, are you a danger to someone else right now and
4 take coercive measures -- and by coercive, I mean moving
11:44 5 somebody to figure that out. To base that assumption on what
6 someone is wearing is just as ridiculous that you make the
7 decision based on what you think the mental status is.

8 Look, it is weird. It is the first civil case I've
9 ever done, and it is just like the criminal cases. It comes
11:44 10 back to common knowledge. It is not common knowledge that the
11 mentally ill are more prone to violence because it is not true.
12 It is just not.

13 And going back, that's not what happened. Going away
14 from the hypothetical, walking up to someone saying, hey, what
11:44 15 is that all about or this is a weird place to be ranting about
16 the CIA, that is not what happened. Officer Lopez, first
17 thing, your language is not appropriate. That is the
18 testimony. Your language is not appropriate, dressed officer,
19 right, that is the violation, because that is the authority of
11:45 20 the state telling you your speech is not appropriate and go,
21 move back to the grass so we can talk to you.

22 Physically moving a citizen from where they are
23 standing with the coercive force of the state, ordering someone
24 to move from where they are standing -- and I don't care if it
11:45 25 is ten feet away -- that is a First Amendment violation.

1 THE COURT: Now, in your view, is there an agreement
2 on those being the facts?

3 MR. REXRODE: There was testimony by Officer Lopez
4 that the first thing that came out --

11:45 5 THE COURT: I understand that. But to say --
6 certainly, from reading the briefs, there seems to me to be
7 certainly a disagreement as to what the facts are, and so
8 you've indicated that there was no real disagreement on the
9 facts. I don't know that is the case, but that is in the
11:45 10 briefs, and I heard the trial.

11 MR. REXRODE: Okay. You have the facts --

12 THE COURT: I don't need to people -- just one at a
13 the time. I don't need people to tell me what -- I am
14 certainly interested in your version or what your view is of
11:46 15 the evidence. That is obviously very important.

16 MR. REXRODE: My view is that the first thing that
17 they said to Mr. Nguyen was your speech was inappropriate, and
18 they told him to move back to that grassy area. And they are
19 not allowed to do that. They just aren't.

11:46 20 And, look, we can -- he was bugging people. He was
21 bugging people. He is allowed to bug people. And that's why
22 they came up. That's why they moved him.

23 And, you know, I mean everything about this case tells
24 you that -- from the very first radio transmittal through the
11:46 25 testimony to one of the last transmittal, this is the Exhibit

1 J, does he, Mr. Nguyen, normally oblige to your request to
2 leave the area? Okay. Ten four. Thank you very much. I
3 think we'll be okay then. Right?

4 Remember, that is these officers talking to the PERT
11:47 5 unit, right, asking them, hey, is this the kind of guy that is
6 just going to get the hell out of here? Yeah, he is. Then
7 we're going to be fine.

8 If there isn't clearer evidence about what motivated
9 these officers, you know what, it is just -- it is -- it is
11:47 10 disingenuous to say that the officers were not motivated by
11 trying to move him out of the area because he was bothering
12 parade-goers, and that is the reason, because that is what it
13 says.

14 There is nothing about, oh, boy, we have to find out
11:47 15 if he is a danger to himself or others or we're really
16 concerned about this guy. It is, will this guy just get the
17 hell out of here? If so, then ten-four. Thank you very much.
18 We'll be okay then. It is just right there. It is what
19 happened.

11:48 20 THE COURT: Any final comments?

21 MS. ROXAS: No, Your Honor.

22 THE COURT: I thank you for your presentations and
23 your briefing, and I'll issue a written decision.

24 Thank you for your representation of Mr. Nguyen.

11:48 25 MR. REXRODE: Your Honor, you are quite welcome.

1 THE COURT: I want to certainly thank you.

2 And I appreciate the work of the city attorney.

3 Mr. Stutler, you are winding up your lustrous career
4 soon.

11:48 5 MR. STUTLER: This will be my last time in court.

6 THE COURT: It was a pleasure having you in this case
7 and in the previous cases, so I wish you well in your future
8 endeavors.

9 MR. STUTLER: Thank you, Your Honor. It has been
11:48 10 wonderful.

11 THE COURT: Thank you very much, Mr. Rexrode, for your
12 excellent advocacy on behalf of Mr. Nguyen.

13 MR. REXRODE: Thank you.

14 (Proceedings concluded at 11:48 a.m.)

15 ---000---

16
17 C-E-R-T-I-F-I-C-A-T-I-O-N

18 I hereby certify that I am a duly appointed, qualified
19 and acting official Court Reporter for the United States
20 District Court; that the foregoing is a true and correct
21 transcript of the proceedings had in the aforementioned cause;
22 that said transcript is a true and correct transcription of my
23 stenographic notes; and that the format used herein complies
24 with the rules and requirements of the United States Judicial
25 Conference.

26 DATED: February 7, 2016, at San Diego, California.

27 /s/ Melinda S. Setterman

28
29 Melinda S. Setterman,
30 Registered Professional Reporter
31 Certified Realtime Reporter